IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRANDON HOLMES,	:	CIVIL NO. 3:16-CV-644
Plaintiff	:	
	:	(Judge Munley)
v.	:	
J. ECK, et al.,	:	(Magistrate Judge Carlson)
Defendants.	:	

MOTION TO DISMISS UNDER F.R.C.P. 12(B)(6) AND MOTION TO STRIKE UNDER F.R.C.P. 12(F)

AND NOW COMES J. Eck, M. Russo, B. Mottern and C. Pizzoli by and through their Attorneys, Gregory T. Moro, Esquire and Hope R. Moro, Esquire and set forth this Motion To Dismiss Under F.R.C.P. 12(B)(6) and Motion To Strike Under F.R.C.P. 12(F):

1. The Defendants are J. Eck, M. Russo, B. Mottern and C. Pizzoli.
2. The Plaintiff is Brandon Holmes, an adult individual, currently incarcerated at Florence ADMAX USP, Florence, Colorado.

3. As a result of an alleged incident on March 10, 2015 at U.S.P. Lewisburg, the Plaintiff filed a Civil Complaint.
4. The Civil Complaint was filed on April 19, 2016.
5. On March 10, 2015, the Plaintiff was an inmate at U.S.P. Lewisburg in the Special Housing Unit (SHU).
6. On March 10, 2015, the Defendants were employed as Correctional Officers at U.S.P. Lewisburg.
7. Pursuant to 28 U.S.C. §1915A, Magistrate Carlson screened the Plaintiff's Complaint and made a Report and Recommendation that, in pertinent part, stated that the United States was dismissed as a party and also striking the Plaintiff's prayer for relief under F.R.C.P 12(F), as the Plaintiff's prayer for relief improperly sought liquidated damages.
8. Magistrate Carlson's Report and Recommendation was adopted by the Court Order dated April 29, 2016.
9. On April 27, 2016, Plaintiff filed an Amended Civil Complaint. (Document 9)
10. Plaintiff's Amended Complaint sets forth a factual summary, but no cognizable cause-of-action against the Defendants.

COUNT I

MOTION TO DISMISS F.R.C.P. 12(B)(6)

11. Paragraphs one (1) through ten (10) are incorporated herein as if set forth at length.
12. In Paragraph II of Plaintiff's Amended Complaint, Plaintiff avers that a decision on his administrative remedies is still "an ongoing investigation on all levels".
13. Given the Plaintiff's averment in Paragraph II, Plaintiff has not exhausted his administrative remedies.
14. This Court does not have jurisdiction over Plaintiff's alleged causes-of-action given that his administrative remedies have not been adjudicated by U.S.P. Lewisburg and/or the Federal Bureau of Prisons.
15. The Plaintiff, for reasons set forth above, has failed to state a claim for relief and thus his claim must be dismissed under F.R.C.P. 12(B)(6).

WHEREFORE, the Defendants respectfully request the Honorable Court dismiss the Plaintiff's Amended Complaint with prejudice.

COUNT II

MOTION TO DISMISS F.R.C.P. 12(B)(6)

16. Paragraphs one (1) through fifteen (15) are incorporated herein as if set forth at length.
17. The Court's Order, resulting from the filing of the Plaintiff's Civil Complaint, was very clear that under F.R.C.P. 12(F) and Local Rule 8.1, Plaintiff was not to have pled liquidated damages unless there were specific ascertainable damages (Document 11).
18. The Court's Order of April 29, 2016 struck Plaintiff's prayer for relief in the form of a specific request for a monetary award of damages.
19. The Plaintiff's Amended Complaint (Document 9) once again violates F.R.C.P. 12(F) and Local Rule 8.1, seeking a "reward" of $500,000.00 in compensatory damages and $500,000.00 in punitive damages.
20. Plaintiff's prayer for relief has consistently been pled incorrectly thus, it must be stricken and Plaintiff's Amended Complaint dismissed with prejudice.
21. If the Court strikes Plaintiff's prayer for relief, his Amended Complaint must be dismissed with prejudice.

WHEREFORE, the Defendants respectfully request the Honorable Court dismiss Plaintiff's Complaint with prejudice.

COUNT III

MOTION TO DISMISS F.R.C.P 12(B)(6)

22. Paragraphs one (1) through twenty-one (21) are incorporated herein as if set forth at length.

23. The alleged significant injuries sustained by the Plaintiff in the March 10, 2015 incident were caused by the restraint, continued striking, the four-point restraint and the grabbing of the Plaintiff's left hand in an attempt to pull him off the bed by individuals other than the Defendants herein.

24. The Plaintiff's Amended Complaint does not state sufficient facts to establish that the above-named Defendants in any way participated in the actions set forth in Paragraph 23 above.

25. The Plaintiff has failed to establish that his injuries, if any, were caused by the above-named Defendants.

26. The Plaintiff's Amended Complaint does not establish that the Defendants acted with malice.

27. Given the above, the Plaintiff has failed to state a claim upon which relief can be granted.

WHEREFORE, the Defendants respectfully request the Honorable Court dismiss Plaintiff's Amended Complaint with prejudice.

COUNT IV

MOTION TO DISMISS F.R.C.P 12(B)(6)

28. Paragraphs one (1) through twenty-seven (27) are incorporated herein as if set forth at length.

29. The Court has construed Plaintiff's cause-of-action to be a Bivens suit under §1983.

30. The Plaintiff, as a result of the incident, claims damages in the nature of physical injury and pain and suffering against the above-named Defendants.

31. Plaintiff's pleading in this Bivens action does not contain any specificity on his claimed damages, namely, his specific injuries, his limitations, if any, the nature of his pain and suffering and/or other damages caused by the above-named Defendants.

32. The Plaintiff's damage claims are conclusory in nature, therefore, Plaintiff has failed to state a proper cause-of-action.

33. Given the conclusive nature of the Plaintiff's pleading and the specificity required under Bivens and the lack of specified injury, the Defendants'

Motion to Dismiss must be granted as Plaintiff has failed to state a claim for relief.

WHEREFORE, Defendants respectfully request the Honorable Court dismiss Plaintiff's Complaint with prejudice.

COUNT V

FAILURE TO JOIN INDISPENSABLE PARTIES

F.R.C.P. 12(B)(7)

34. Paragraphs one (1) through thirty-three (33) are incorporated herein as if set forth at length.

35. Plaintiff has failed to join necessary and indispensable parties who were involved in the restraint, continued striking, four-point restraint and physically removing the Plaintiff's left hand restraints and pulling him up from his bed, all of which occurred after the initial incident.

36. The Plaintiff's Amended Complaint names F. Alama as a witness and no others who arrived on the scene after the initial incident and participated as set forth in Paragraph 35 herein.

37. The above-named Defendants were not involved in the actions of the other individuals after the initial restraint.

38. Plaintiff had more than two (2) years to join the necessary parties-in-interest, but has failed to join the individuals who ordered and participated in the restraint and striking of his person after the initial involvement with the above-named Defendants.

39. The Plaintiff has failed to join indispensable parties to this action and therefore, his Amended Complaint must be dismissed with prejudice.

WHEREFORE, the Defendants respectfully requests the Honorable Court dismiss the Plaintiff's Amended Complaint with prejudice.

COUNT VI

MOTION TO STRIKE LOCAL RULE 8.2, F.R.C.P 8(A)(3)

40. Paragraphs one (1) through thirty-nine (39) are incorporated herein as if set forth at length.

41. The Plaintiff's prayer for relief in his Amended Complaint seeks unliquidated damages but sets forth a specific monetary request in both compensatory and punitive damages of $500,000.00.

42. Plaintiff's prayer for relief in his Amended Complaint must be stricken under Local Rule 8.1 and F.R.C.P. 8(A)(3).

WHEREFORE, the Defendants respectfully request the Honorable Court strike Plaintiff's prayer for relief.

Respectfully submitted,

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Defendants.	:	

CERTIFICATE OF SERVICE

We, Gregory T. Moro, Esquire and Hope R. Moro, Esquire, do hereby certify that on this 2nd day of May, 2017, we served a true and correct copy of the foregoing Motion To Dismiss Under F.R.C.P. 12(B)(6) and Motion To Strike Under F.R.C.P. 12(F), upon the following party, by

United States mail, postage pre-paid to the following address:

Brandon Holmes-Register Number: 73170-004
USP Florence ADMAX
U.S. Penitentiary
PO BOX 8500
Florence, CO 81226

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